SUBJECT INDEX

Page

Reply Brief for the Petitioners 1

I.

Utilization of 42 U.S.C. Section 1988 Herein to Adopt State Law Does Not Conflict With Any Intent of Congress Concerning the Scope of a State's Imposition of Vicarious Liability Upon Its Public Entities 1

A. Section 1988's Application Is Dependent Only Upon a Court Having Jurisdiction of a Civil Rights Acts Case 1

B. State Law Imposition of Vicarious Liability Upon Its Public Entities Is Not Inconsistent With the Civil Rights Acts 4

C. The Adequacy of a State Remedy Does Not Preclude the Use of Section 1988 but Rather Compels Its Use 5

D. California Law Does Provide for a Direct Vicarious Liability Action Against Its Public Entities 8

E. There Are No Policy Considerations Dictating Against the Utilization of Section 1988 Herein 9

II.

The Policy Considerations Inherent in the Doctrine of Pendent Jurisdiction Justify Its Application, in Appropriate Cases, to a Pendent Party 12

III. Page

The County of Alameda Cannot, in Any Sense, Be Equated to the State of California in This Case 13

Conclusion 15

Exhibit A. Memorandum 1

TABLE OF AUTHORITIES CITED

Cases	Page
Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. den., 405 U.S. 944 (1972)	12
Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961)	6, 11
Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) rev'd. sub nom. District of Columbia v. Carter, ... U.S. .... 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564)	3
District of Columbia v. Carter, ... U.S. ...., 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564)	1
Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971)	3, 5, 11
Holytz v. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962)	10
Krisel v. Duran, 386 F.2d 179 (2d Cir. 1967)	13
Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955)	3
Markham v. Newport News, 292 F.2d 711 (4th Cir. 1961)	10, 14
McAndrew v. Mularchuck, 33 N.J. 172, 162 A.2d 820 (1960)	10
McDaniel v. Carroll, 457 F.2d 968 (6th Cir. 1972), cert. denied, ... U.S. ...., 41 U.S.L.W. 3370 (Jan. 8, 1973) (No. 72-338)	3, 5, 11
Milligan, Ex parte, 71 U.S. (4 Wall.) 2, 112 (1866)	2
Molitor v. Kaneland Community Unit. Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959)	10
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)	4, 9

Page

Na-Ja Construction Corporation v. Roberts, 259 F. Supp. 895 (D.Del. 1966) 14

O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 38 L.Ed. 980 (1914) 11

People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971) 14

Schultz v. Greater New Orleans Expressway Com'n, 250 F.Supp. 89 (E.D. La. 1966) 14

Scruggs v. Haynes, 252 Cal.App.2d 256, 60 Cal. Rptr. 355 (1967) 8

Stone v. Arizona Hwy. Comm'n., 93 Ariz. 394, 381 P.2d 107 (1963) 9

Sullivan v. Little Hunting Park, 395 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) 4, 6

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) 12

United States ex rel. Washington v. Chester County Police Dept., 294 F.Supp. 1157 (E.D. Pa. 1969), aff'd. on reh., 300 F.Supp. 1279 (E.D. Pa. 1970) 3

Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) 10

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) 6

Statutes	Page
Alaska Statutes, Sec. 09.65.070 (1962)	10
California Government Code, Sec. 810	8
California Government Code, Sec. 815.2	9
California Government Code, Sec. 815.2(a)	8
California Government Code, Sec. 818	9
California Government Code, Sec. 825	8
California Government Code, Sec. 895.2	9
California Government Code, Sec. 945	8
California Government Code, Secs. 945-949	8
Florida Statutes, Sec. 95.24 (1967)	10
Hawaii Revised Laws (Supp. 1965), Sec. 245A-2	9
Idaho Code Annotated, Sec. 41-3505 (1961)	10
Iowa Code Annotated, Secs. 25A1-A20 (1967)	10
Minnesota Statutes, Secs. 466.01-.15 (1969)	10
Missouri Statutes Annotated, Sec. 71.135 (1970)	10
New Hampshire Revised Statutes Annotated, Sec. 412.3 (1968)	10
New Mexico Statutes Annotated, Sec. 5-6-20 (1966)	10
New York Court of Claims Act, Sec. 8 (1963)	10
Nevada Revised Statutes, Sec. 41.031 (1968)	10
North Carolina General Statutes, Secs. 143-291, -300.1 (1964)	10
North Dakota Central Code, Sec. 40-43-07 (1968)	10
Oklahoma Statutes Annotated, Sec. 1753 (1965)	10
United States Code, Title 42, Sec. 1981	3
United States Code, Title 42, Sec. 1988	1, 2, 3, 4, 5, 6, 9, 11

Page

Vermont Statutes Annotated, Title 29, Sec. 1403 (1970) 10

Virginia Code Annotated, Sec. 8-42.1 (1970) 10

Washington Revised Code, Secs. 4.92.010-4.96.020 (1970) 10

Wyoming Statutes Annotated, Sec. 15.1-4 (1965) 10

Textbooks

40 Fordham Law Review, pp. 400, 409 (1971) 12

9 Houston Law Review, pp. 131, 139 (1971) 12

9 Houston Law Review, A Municipality is a "Person" Under 42 U.S.C. §1983 Where Local Law Has Abolished Sovereign Immunity (1972), p. 587 4

Kates, Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act, 4 Clearinghouse Revised (1970), pp. 177, 196-199 4

55 Minnesota Law Review, Developing Governmental Liability Under 42 U.S.C. §1983 (1971), pp. 1201, 1215, n. 68 .....2, 4

55 Minnesota Law Review, Developing Governmental Liability Under 42 U.S.C. §1983 (1971), pp. 1201, 1216-1217, n. 75 9

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

In view of the Court's recent decision in *District of Columbia v. Carter*, ...U.S. ...., 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564), which reversed the opinion of the D.C. Circuit Court of Appeals, and because the respondents' brief is so filled with unfounded and inaccurate statements, plaintiffs submit the following reply.

I.

Utilization of 42 U.S.C. Section 1988 Herein to Adopt State Law Does Not Conflict With Any Intent of Congress Concerning the Scope of a State's Imposition of Vicarious Liability Upon Its Public Entities.

A. Section 1988's Application Is Dependent Only Upon a Court Having Jurisdiction of a Civil Rights Acts Case.

Building upon a series of erroneous and unfounded premises, defendants have ascribed to 42 U.S.C. §1988

an interpretation that finds no support either in its language or in its legislative history.[1] Thus, defendants' contention that §1988 can only be used for a party over whom a federal court otherwise has jurisdiction under the Civil Rights Acts is wrong. Section 1988 speaks in terms of extending state law to certain civil rights "matters" because the particular Civil Rights statute involved in the "case" is either "not adapted to the object" or is "deficient in the provisions necessary to furnish suitable remedies." Stated otherwise, it is because a federal court has jurisdiction of "such . . . cause" rather than jurisdiction over a party that allows it to utilize §1988.

That there is a conceptual distinction between the term "cause" as used in §1988 and "party" is obvious. This Court long ago in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112 (1866) stated: "In any legal sense, action, suit, and cause are convertible terms." The Court went on to state that conceptually "cause" related to the right being asserted by a party. Thus, it is the substance of the plaintiffs' Civil Rights Acts claims, or "cause," to which §1988 relates and not to any particular party defendant.

In the instant case, if the substance of the plaintiffs' Civil Rights Acts claims can be made more effective because of a state law that increases the likelihood of recovery upon a judgment then §1988 *compels* the district court to extend that state law into the "cause"

---

[1]An excellent summary of the legislative history of §1988 can be found in *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 Minn. L. Rev. 1201, 1215 n. 68 (1971). After reviewing this legislative history the author concludes that "[t]here was no clear indication of congressional purpose in enacting the statute." *Id.* at 1216.

before it.[3] Such extension is required even if it results in imposing a state-created liability upon a party not otherwise liable under the Civil Rights Acts.

In support of this point, plaintiffs have previously cited and discussed the Court's of Appeals' opinions in *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *rev'd. sub nom. District of Columbia v. Carter*, ... U.S. ...., 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564), as that opinion had not yet been reversed, *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971), and *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955). However, since *Carter* has now been reversed, albeit on a point of law having no application herein, the continued validity of its analysis of §1988 has become speculative, at best. But, irrespective of *Carter's* continued validity, the fact still remains that there are other cases which have accomplished conceptually what defendants contend, without authority, cannot be accomplished, namely a federal court having jurisdiction to impose a state-created liability in a Civil Rights Acts case solely because of the interaction between state law and §1988.

A recent example of this approach is *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, ... U.S. ...., 41 U.S.L.W. 3370 (Jan. 8, 1973) (No. 72-338). In *McDaniel*, Tennessee law imposed vicarious liability upon a sheriff and his surety for torts committed by a deputy sheriff in the performance of his official duties, and authorized the imposition of

---

[3] Cf., *United States ex rel. Washington v. Chester County Police Dept.*, 294 F.Supp. 1157 (E.D. Pa. 1969), *aff'd. on rehearing*, 300 F.Supp. 1279 (E.D. Pa. 1970), wherein §1988 was used in connection with 42 U.S.C. §1981 to provide a damage remedy by incorporating the remedy available under the common law tort of battery.

both compensatory and punitive damages for such torts. Applying Tennessee law and referring to §1988 and this Court's decision in *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969), the Court of Appeals affirmed the district court's imposition of vicarious liability for punitive damages upon the sheriff and his surety for a violation of the Civil Rights Acts committed by a deputy. Pendent jurisdiction was also referred to as a basis for the decision.

In the light of these cases, as well as extensive comment by legal scholars who have supported the kind of §1988 analysis plaintiffs now urge,[8] plaintiffs submit that there is no basis for restricting §1988's application to the confines suggested by the defendants.

B. State Law Imposition of Vicarious Liability Upon Its Public Entities Is Not Inconsistent With the Civil Rights Acts.

Defendants' inconsistency argument ignores what in fact occurred during the congressional debates on the Sherman Amendment, and attributes to *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) a holding that is nowhere to be found in the opinion. The defendants' basic premise is that not only did Congress not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees, but that Congress also intended

[8] In addition to the Kates & Kouba article referred to in the Brief for the Petitioners *see generally, A Municipality is a "Person" Under 42 U.S.C. §1983 Where Local Law Has Abolished Sovereign Immunity*, 9 Houston L. Rev. 587 (1972); *Developing Governmental Liability Under 42 U.S.C. §1983, supra*, note 1; Kates, *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 Clearinghouse Rev. 177, 196-199 (1970).

to preclude a state from imposing such vicarious liability as a matter of state law. Analysis of the legislative history of the Sherman Amendment, however, belies that premise.

Plaintiffs have previously shown that to the extent that Congress discussed the question of a federal court imposing a state-created liability, the comments were that such jurisdiction would indeed exist. (Brief for the Petitioners at 15.) Defendants have offered no contrary statements from the Sherman Amendment debates. Moreover, any fair reading of *Monroe* and of the congressional debates surrounding the Sherman Amendment compels the conclusion that all Congress was concerned with, and all that this Court ever indicated Congress was concerned with, was the imposition of municipal liability *by virtue of federal law.*

Thus, the contention that the recognition of state law that imposes vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees is inconsistent with the Civil Rights Acts is fallacious. Indeed, if the concept of vicarious liability is consistent with the Civil Rights Acts, and it is according to cases such as *McDaniel* and *Hesselgesser*, then it should make no difference upon whom a state chooses to impose that vicarious liability. To hold otherwise would truly ascribe to Congress something it never intended.

C. The Adequacy of a State Remedy Does Not Preclude the Use of Section 1988 but Rather Compels Its Use.

Defendants' inadequate remedy argument apparently confuses two separate concepts. They are (i) defiant federal laws allowing for §1988 to apply and (ii) adequacy of a state remedy. Of these two concepts,

§1988 is concerned only with the former, and was designed to allow for the recognition of adequate state laws to correct these federal law deficiencies. *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969); *Brazier v. Cherry*, 293 F.2d 401, 409 (5th Cir. 1961). As previously shown, state statutes imposing vicarious liability have been considered appropriate for §1988 adoption.

To the extent that defendants argue, however, that plaintiffs do not need §1988 because they have an adequate state remedy, they are injecting a restriction into §1988 which is inherently inconsistent with its provisions, since §1988 is designed to adopt the "adequate state remedy" into the federal court case. Thus, only the adequacy of state law in an area where federal law is deficient compels the use of §1988.

In addition, merely because a state may have enacted adequate provisions for the protection of its citizens or because a case could have been brought in the state court is no reason for denying a person his choice of a federal forum for the adjudication of his federal constitutional rights. For, as stated in *Zwickler v. Koota*, 389 U.S. 241, 248 [88 S.Ct. 391, 19 L.Ed.2d 444] (1967):

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a stitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn respon-

sibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .,' Robb v. Connolly, 111 US 624, 637, 28 L ed 542, 546, 4 S Ct 544. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum. Stapleton v Mitchell, 60 F Supp 51, 55; see McNeese v Board of Education, 373 US, at 674, note 6, 10 L ed 2d at 627. Cf. Cohens v Virginia, 6 Wheat 264, 404, 5 L ed 257, 291."

The importance of a federal forum for these cases is particularly highlighted when consideration is given to their substantive nature. Significant questions concerning the use of deadly force in crowd control situations and the responsibilities of superior officers for providing adequate training and leadership for deputies upon whom they choose to rely in such situations have been raised. Answers to these questions in a federal constitutional sense will require a considerable amount of interpretation and application of federal law. Given this task, plaintiffs doubt that a state court involved in the multitude of state law issues could even begin to give the kind of extensive analysis furnished by the federal district court in these cases.[4]

---

[4] In addition to Appendices D, E and F to the Petition for Writ of Certiorari, at 15, 18 and 21 respectively, a further example of the kind of interpretation and analysis which plaintiffs feel can more realistically result from a federal court is the district court's most recent decision filed in these cases on November 28, 1972. As that decision has not yet been reported, a copy is attached hereto as Exhibit "A."

D. California Law Does Provide for a Direct Vicarious Liability Action Against Its Public Entities.

Perhaps the most remarkable of all of the assertions made by the defendants is the following:

> "In short, California does not provide a direct vicarious liability action against its public entities, and such an action would not be desirable." (Brief for the Respondents at 17-18.)

How the defendants can take that position in view of §815.2(a) of the California Government Code and cases such as *Scruggs v. Haynes*, 252 Cal.App.2d 256, 267-268 [60 Cal.Rptr. 355] (1967) escapes plaintiffs. Moreover, Part 4, Chapter 2 (§§945-949, California Government Code) of the California Tort Claims Act (§§810 *et seq.*, California Government Code) is specifically entitled "Actions Against Public Entities." Section 945 states: "A public entity may sue *and be sued*" (emphasis added). Defendants are, thus, wrong in their direct action contention.

The other rather remarkable assertion made by defendants concerning California law is their apparent concession that §825 of the California Government Code includes within its scope Civil Rights Acts claims against a public entity's employees. Given that concession, there is then no reason for saying that Civil Rights Acts claims are not also within the scope of §815.2(a). While it is true that §825 speaks in terms of defending an employee against "any claim or action" and §815.2 (a) speaks in terms of an employee's actions giving rise to "a cause of action," those terms are obviously substantively identical. Thus, since California law has provided for a direct action against a public entity for wrongs committed by the entity's employees, there is

no basis for concluding that because of California law plaintiffs cannot now sue the County of Alameda.

In addition, because of provisions such as §895.2 of the California Government Code, which provides that a judgment procured against a public entity can serve as the basis for suit against certain other public entities who acted in concert, as was the case with the County of Alameda and other public entities on May 15, 1969, it is essential that plaintiffs obtain a judgment against the County in order to then pursue these other entities.

E. There Are No Policy Considerations Dictating Against the Utilization of Section 1988 Herein.

The only remaining argument advanced by the defendants for not using §1988 herein is their perception of "sound policy" and the possible lack of uniformity that could result.

While the question of whether a public entity should assume vicarious liability for the torts of its employees is a question of policy upon which reasonable persons might differ, the trend since *Monroe v. Pape, supra,* is to impose such liability.[6] Moreover, in view of the enactment of the California Tort Claims Act any dis-

---

[6]In *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 Minn. L. Rev. 1201, 1216-1217, n. 75 (1971), the author summarizes the law in this area as follows:

> The common law rule [sovereign immunity] has been modified in some states by statutes and judicial decisions. In the following states the state and its political subdivisions are liable for the torts of their officials:
>
> Arizona: *Stone v. Arizona Hwy. Comm'n*, 93 Ariz. 394, 381 P.2d 107 (1963).
>
> California: Cal. Gov't. Code §§815.2, 818 (1966).
>
> Hawaii: Hawaii Rev. Laws §245A-2 (Supp. 1965).

(This footnote is continued on next page)

cussion of this policy herein is irrelevant since California's decision to impose vicarious liability has already been made.

Iowa: Iowa Code Ann. §§25A1-A20 (1967).

Minnesota: Minn. Stat. §§466.01-.15 (1969).

Nevada: Nev. Rev. Stat. §41.031 (1968).

New York: N.Y. Ct. Cl. Act §8 (1963).

North Carolina: N.C. Gen. Stat. §§143-291, -300.1 (1964).

Washington: Wash. Rev. Code §§4.92.010-4.96.020 (1970).

Wisconsin: *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

In the following states municipalities are liable for the torts of their officials:

Alaska: Alaska Stat. §09.65.070 (1962).

Florida: Fla. Stat. §95.24 (1967).

Illinois: *Molitor v. Kaneland Community Unit. Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

Michigan: *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

New Jersey: *McAndrew v. Mularchuck*, 33 N.J. 172, 162 A.2d 820 (1960).

Oklahoma: Okla. Stat. Ann. §1753 (1965).

Virginia: Va. Code Ann. §8-42.1 (1970) (this statute was mistakenly placed in the venue section of the Va. Code; *Markham v. Newport News*, 292 F.2d 711 (4th Cir. 1961).

In the following states municipalities are liable for the torts of their officials to the extent that the municipalities have insurance:

Idaho: Idaho Code Ann. § 41-3505 (1961).

Missouri: Mo. Stat. Ann. §71.185 (1970).

New Hampshire: N.H. Rev. Stat. Ann. § 412.3 (1968).

New Mexico: N.M. Stat. Ann. §5-6-20 (1966).

North Dakota: N.D. Cent. Code §40-43-07 (1968).

Vermont: Vt. Stat. Ann. tit. 29, §1403 (1970).

Wyoming: Wyo. Stat. Ann. §15.1-4 (1965).

In the following states there is no statutory imposition of municipal liability;

Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia.

As for a potential lack of uniformity, that result is inherent in the use of §1988 in any context. Section 1988, on its face, shows that it was not designed to promote national uniformity but rather to allow supplemental use of state law. Thus, variations already exist with regard to statutes of limitations, *O'Sullivan v. Felix*, 233 U.S. 318 [34 S.Ct. 596, 38 L.Ed. 980] (1914); survival of a cause of action, *Brazier v. Cherry*, 293 F. 2d 401 (5th Cir. 1961); vicarious liability of a sheriff, *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) and of his surety, *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, ... U.S. ...., 41 U.S.L.W. 3370 (Jan. 8, 1973) (No. 72-338). Any departure from a policy of uniformity is, therefore, the result of §1988 itself and not the result of any judicial decision to utilize §1988 in the manner intended.

Congress has already balanced the desire to make the Civil Rights Acts as effective as possible against a desire for total national uniformity and has concluded that uniformity remain secondary. The Court should not, therefore, make uniformity paramount at the expense of the Civil Rights Acts' efficacy.

In the final analysis, adoption of the plaintiffs' position on §1988 would not penalize those states which have abrogated sovereign immunity. Rather, it would merely provide another forum for the implementation of the state's policy decision to insure that its citizens are fully redressed for wrongs committed by public employees.

II.

The Policy Considerations Inherent in the Doctrine of Pendent Jurisdiction Justify Its Application, in Appropriate Cases, to a Pendent Party.

To the extent that the defendants base their argument against pendent party joinder upon efforts to factually distinguish a particular case, or upon contentions of adequate state remedy, they avoid the heart of the issue which is whether a federal court has the *power*, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966) and its progeny, to join a party on a pendent state claim that otherwise meets the requirements of *Gibbs* when he is not also a party to the related federal claim. Plaintiffs submit that if the general policy objectives of pendent jurisdiction, as defined in *Gibbs*, are sound, which plaintiffs believe they are, then the conclusion that such power should exist for discretionary application to pendent parties in appropriate cases is warranted. *See generally*, 40 Fordham L. Rev. 400, 409 (1971); 9 Houston L. Rev. 131, 139 (1971).

Further support for this concept of federal judicial power can be seen from the following statements in *Almenares v. Wyman*, 453 F.2d 1075, 1084 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972):

> "The question of the court's power revolves around two bodies of law: on the one hand, there are the traditional statutory jurisdictional requirements; on the other, there are the expanding principles of ancillary and pendent jurisdiction. To be sure, before an action can be brought in the federal courts, the requirements of some jurisdictional statute must be met. Here the named plaintiffs satisfied this under 28 U.S.C. § 1343(3).

> This is sufficient to vest the court with subject-matter jurisdiction not merely over their primary claim, but also over their own pendent claims—all those arising from the "common nucleus of operative facts"—whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs." (Emphasis the court's.)

As for the defendants' efforts to capitalize upon the erroneous attempt of the court below to justify its lack of power holding upon the basis of an alleged "discretionary" ruling by the district court, plaintiffs again submit that any fair reading of the district court's opinion shows that it was not predicated upon an exercise of discretion. (See Brief for the Petitioners at 35-36.)

III.

The County of Alameda Cannot, in Any Sense, Be Equated to the State of California in This Case.

Of all of the positions taken by the defendants, one of the least defensible is their assertion that the County of Alameda is, in reality, an agency of the State of California and, as a result, that the State of California is the "real party in interest." For, when diversity jurisdiction is in question because a defendant claims to be a state agency, "the determinative factor is whether the state is the real party in interest." *Krisel v. Duran*, 386 F.2d 179, 181 (2d Cir. 1967). Plaintiffs submit that no person who has any familiarity with California politics or California law could even begin to argue that, as a matter of form or substance, the State of California is the real party in interest in these cases.

While it is true that certain pre-California Tort Claims Act cases did allude to the fact that a county was a political subdivision of the state and as such held certain property in trust for the people of the entire state, the substance of that kind of controversy has absolutely no relevance to the issue of the status of a county in a suit brought against it in a federal court by a private citizen under the California Tort Claims Act. Much more determinative of a California county's true status is the California Supreme Court's most recent discussion of the subject in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 [96 Cal.Rptr. 553, 487 P.2d 1193] (1971). In that case the corporate nature of a county and its separateness from the State of California were clearly stated.

Finally, to dispel the defendants' self-imposed "grave doubt" concerning the eleventh amendment permitting suit against the County in these cases, reference is made to *Markham v. City of Newport News*, 292 F.2d 711, 716-718 (4th Cir. 1961); *Na-Ja Construction Corporation v. Roberts*, 259 F.Supp. 895, 898-899 (D. Del. 1966); and *Schultz v. Greater New Orleans Expressway Com'n*, 250 F.Supp. 89, 92-94 (E.D. La. 1966), which hold that a state may not immunize its public entities from suit in a federal court once it has authorized suit against its public entities in state courts.

Plaintiffs, therefore, respectfully request the Court to reverse the opinion of the court below on the diversity issue even if plaintiffs prevail on their other points. Otherwise, California counties will be given unwarranted protection from suit in a federal court on almost every conceivable type of diversity case that could be brought.

Conclusion.

For the reasons stated above, and in the Brief for Petitioners heretofore filed, it is respectfully submitted that the judgment of the court below should be reversed.

RONALD M. GREENBERG,
Counsel for Petitioners.

EXHIBIT "A."

Memorandum.

In the United States District Court, Northern District of California.

William Donovan Rundle, Jr., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70-334 RFP and No. C-70-333 RFP.

Defendants have moved to dismiss or in the alternative for summary judgment on counts 1 and 5 of plaintiffs' amended complaint. These counts allege causes of action based on violations of plaintiffs' civil rights, pursuant to 42 U.S.C. § 1983, 1985(3). Plaintiffs have moved for summary judgment on count 1. In addition to their other contentions, defendants interpose the defense of sovereign immunity against all the acts complained of. The complaint alleges the shooting of plaintiffs by the defendant Riche and asserts claims against the other defendants based on their improper supervision of Riche.

1. *Sovereign Immunity.*

It is important to note at the outset that the Sheriff may not be held *vicariously* liable for the acts of his subordinates. This rule was set down by the Ninth Circuit in *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir. 1971). Thus, if the Sheriff is to be held liable for any injuries sustained by the plaintiffs, there must be a showing that the Sheriff *by his own acts* violated one of the Civil Rights Acts in question.

Plaintiffs allege that Sheriff Madigan committed several acts for which he should be held liable.

"a. Failing to adequately plan to deal with the events that occurred in Berkeley on May 15, 1969 in spite of his having been informed by

his own intelligence network well in advance of May 15, 1969, that a riot could be expected if any efforts were made to clear People's Park;

b. Failing to utilize any meaningful criteria or standards in selecting which members of the Alameda County Sheriff's Department would be used in Berkeley on May 15, 1969 in spite of such warning;

c. Selecting deputy sheriffs who were essentially untrained in riot control work, and in some instances, still on a probationary status, to work in Berkeley on May 15, 1969;

d. Issuing riot guns and double-aught buckshot to these essentially untrained and probationary deputies; and

e. Failing to provide any leadership or control of these deputies once the guns and ammunition had been issued."

The defendant Madigan argues that these acts are discretionary and should be protected by the doctrine of sovereign immunity. The Court disagrees. "Discretionary acts" are narrow in scope; for example, "discretionary acts" for the purpose of applying doctrine are narrower in breadth than acts within the scope of authority. Courts have been extremely reluctant to invoke the immunity doctrine in § 1983 cases. *See, e.g., Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971).

The defendant's own authority likewise seems to go against him. *Boreta v. Kirby*, 328 F. Supp. 670 (N.D. Cal. 1971), asks: "is the act complained of the result of

a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" In the instant case, the answer to this query is no.

2. *The Section 1985(3) Claim.*

Several elements constitute a § 1985 conspiracy claim. One is that the plaintiffs have been deprived of "equal protection of the law" or of "equal privileges and immunities under the law." Due process violations *alone* do not suffice. Defendants argue that plaintiffs cannot show such a deprivation of equal treatment, citing *Collins v. Hardyman*, 341 U.S. 651, 661 (1950). *See also Snowden v. Hughes*, 321 U.S. 1 (1944), and *Egan v. City of Aurora*, 291 F.2d 706 (1961).

Plaintiffs argue in response that either 1) § 1985 covers due process violations as well; or 2) they *have* made a sufficient showing of discriminatory treatment to withstand defendants' motion for summary judgment. The only case they cite to support their position is *Griffin v. Breckenridge*, 403 U.S. 88 (1971), which reverses *Collins* to the extent that § 1985 now applies to private individuals. Thus, under *Collins*, the plaintiffs must still show some denial of equal protection to make out a § 1983 claim. This they have failed to do. Summary judgment is therefore granted as to all defendants on all claims based on § 1985(3).

3. *Section 1983 Conspiracy Claim.*

There are two questions here. First, can one validly make a *conspiracy* claim under § 1983? Second, if so, are there sufficient issues of fact to defeat either side's motion for summary judgment on this issue?

The Ninth Circuit has ruled that a plaintiff *can* state a civil cause of action for conspiracy under § 1983. *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959). The former case involved a mental patient in a state hospital who was allegedly improperly held in the hospital; the latter case involved a suit against city police officers for unreasonable searches and seizures. The appellate court in both cases held that it was unnecessary to allege a conspiracy to deny the plaintiffs the equal protection of the laws; a conspiracy to deprive them of their civil rights *without due process* was sufficient to state a claim under § 1983. *See also Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970).

Clearly, conspiracy must still involve an allegation and proof of *purpose*. Plaintiffs argue that the language of *Cohen v. Norris* eliminates the purpose requirement. This Court disagrees. However, although plaintiffs' allegations and facts concerning purpose are skimpy, the requisite purpose may be inferred therefrom. Defendants' motions for dismissal or summary judgment on the §1983 claim are denied.

4. *Section 1983 Tort Claim.*

In claim 5 of their amended complaint, plaintiffs allege that "These acts [of misfeasance by the Sheriff, noted above] were the result of a conscious indifference or disregard of the possible consequences to the plaintiff. . . ." The immediate result of the actions of the sheriff and deputies was the shooting of plaintiffs by officer Riche. Plaintiffs allege that that shooting deprived plaintiffs of their rights to life and liberty without due process of law, in violation of the 14th Amendment. The actual deprivation of a constitutional right

is therefore pleaded, without regard to the actions of Riche's superiors.

Having established that the superiors acted under color of state law, and that the plaintiffs were deprived of a constitutional right, the question becomes, did the actions of the supervisors directly cause that deprivation? Again, the answer seems clear; Riche fired on plaintiffs and inflicted their injury only because, according to plaintiffs, he was placed on duty and given the weapons and instructions to use them by his superiors. In the language of § 1983, the superiors "cause[d] [plaintiffs] to be subjected . . . to the deprivation of . . . rights . . . secured by the Constitution and laws. . . ."

Since *Monroe v. Pape*, 365 U.S. 167 (1961), § 1983 has been read "against the background of tort liability making a man responsible for his acts."[1] Courts have put to rest former notions that relief under § 1983 depended upon proof that the deprivation complained of was the result of the intentional act of the defendant. *See, e.g., Whirl v. Kern*, 407 F.2d 781, 787-89 (5th Cir. 1969), *cert. den.* 396 U.S. 901. Defendants in the instant case argue, however, that at least a "quasi-intent" on the part of the Sheriff and his deputies is required to hold them liable for plaintiffs' injuries under § 1983.

The current of recent decisions in all circuits is against this contention. The Ninth Circuit has not settled the question what degree of culpability is required to state a cause of action under § 1983. In *Williams v. Field*, 416 F.2d 483, 485 (9th Cir. 1969), the court affirmed the dismissal of a complaint from a

[1]The statute predating § 1983 [18 U.S.C. § 242] in terms required *intentional* deprivation; § 1983 omits any "intent".

San Quentin inmate who alleged that the prison authorities failed to protect him from the attack of another prisoner after they had been put on notice that such an attack would take place. In so holding, the court said:

> "Since *Monroe v. Pape*, . . . some courts, like the district court in the instant case, have held that unintentional conduct does not state a claim under section 1983. . . . Another court has indicated that negligent conduct in the appropriate circumstances may support a claim under section 1983. . . . The 'natural consequences' test formulated by Mr. Justice Douglas apparently leaves open the question of the degree of culpability required by section 1983. It may be that negligent conduct, in the appropriate circumstances, will support an action under section 1983. . . . Mere negligent failure to act, standing alone, however, would seem insufficient.
>
> . . .
>
> In addition to an allegation of the requisite degree of culpability, plaintiffs in section 1983 actions must show a violation of federally secured rights."

The Ninth Circuit has not spoken on the question of the requisite degree of culpability since this opinion.

In the Fourth and Fifth circuits, courts have held that negligence alone is sufficient to state a cause of action. However, the facts of the cases decided differentiate, and to some degree belie, these holdings. The outstanding case is *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). There, the court (Sobeloff, J.) specifically found the reckless use of excessive force by

a police officer seeking to arrest plaintiff. The court held that plaintiff's complaint stated a cause of action under § 1983, and specifically distinguished the "raw abuse of power" present in the case before it from cases of simple negligence. The court held that the requirements of § 1983 were satisfied by "gross and culpable negligence." *Id.* at 1231-32. Simple negligence was not the basis of the decision.

In a very recent Fourth Circuit opinion (Sobeloff, J.), the court holds that simple negligence alone may satisfy § 1983. *McCray v. Maryland*, 456 F.2d 1, 4-5 (4th Cir. 1972). The district court dismissed a civil rights complaint alleging that plaintiff's constitutional rights to access to the courts had been denied by a clerk of the state court who had negligently failed to file plaintiff's writ of habeas corpus. The circuit court reversed and ordered the district court to hear the case. The only authority cited for this holding was the decision in *Jenkins v. Averett*.

In the Fifth Circuit, the courts have granted relief in cases involving the equivalent of "gross negligence." *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), *cert. den.* 404 U.S. 866, is a case quite similar factually to that before this court. The superintendent of a prison farm was held liable for injuries to a prisoner shot by a 'trusty' who was overseeing work on a public road. The trusty's rifle discharged as a result of his negligence. The superintendent was held liable because of his failure properly to train the trusty in the use of firearms and for the specific job he entrusted to him. The precise facts of the failures to train, related to the district judge and noted in the circuit court's opinion, are extremely similar to the allegations directed at the

sheriff and his deputies in this case. *See id.* at 822-23. *See also Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972).

Many courts have read the Fourth Circuit decision in *Jenkins* for the proposition that negligence—whether simple or gross—is sufficient culpability to state a cause of action under § 1983. *See Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358, 365 & n.20 (D.C. Cir. 1971); *Build of Buffalo, Inc. v. Sedita, et al.*, 441 F.2d 284 (2d Cir. 1971). Other courts as well have been imprecise in finding allegations of negligence sufficient under § 1983. *See Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Daniels v. Van De Venter*, 382 F.2d 29, 31 (10th Cir. 1967); *Stringer v. Dilger*, 313 F.2d 536, 540-41 (10th Cir. 1963).

Fortunately, some courts have been clearer about the distinction drawn in *Jenkins* between simple and gross negligence. The court in *Mullins v. City of River Rouge*, 338 F.Supp. 26 (E.D. Mich. 1972), dismissed the complaint of a plaintiff who was arrested on a city street in winter and taken to the station as a drunk. In fact, he was not drunk and was suffering from severe frostbite. As a result of the neglect of his captors, all his fingers and parts of his thumbs were amputated. He charged the arresting officers with negligence in failing to perceive the frostbite and not rendering him medical attention. The court found that the officers were not in fact negligent, but that even assuming negligence, they could not be held liable under § 1983. The court cited *Jenkins* and drew the distinction between mere negligence and gross negligence. *See also Richardson v. Snow*, 340 F.Supp. 1261 (D. Md. 1972).

This Court's decision whether plaintiffs' allegations state a cause of action under § 1983 should consider the policy behind allowing recovery under the civil rights acts. If the purpose of the acts is to deter individuals acting under color of state law from abusing the rights of others, then the distinction between gross and simple negligence is sensible. There is deterrent value in charging a sheriff, or even a court clerk, with the responsibility for organizing and supervising the affairs of his office so as to insure against even the *chance* that someone's constitutional rights will suffer as a result of his or one of his subordinate's actions. In every case refusing to dismiss a complaint where only negligence is alleged, we have a situation, as we do here, where reasonable precautions can easily avoid catastrophic consequences, delegating authority to wield and discharge a firearm in the presence of people is a very serious matter, demanding a high degree of care. Failure to exercise such care would seem to be gross negligence, which is the same as conscious disregard for the rights of others. The case of the court clerk's mistake, however, is not gross negligence, and it can only be explained if the policy of the statute encompasses the deterrence of patterns or systems of behaviour dangerous to civil rights. The actions alleged in the instant case would fall within this rationale as well.

However, it is likewise possible to view § 1983 as giving a straightforward tort remedy for *any* deprivation of civil rights caused by one acting under color of law, no matter how such deprivation came about. At least one court has taken this view:

> "[U]ntil the legislature provides a substitute scheme for compensating the victims of police

> torts, common law principles and the federal Civil Rights Act guarantee to people like [plaintiff] at least a day in court." *Carter v. Carlson*, 447 F.2d 358, 370 (D.C. Cir. 1971).

If all deprivations that can be proved are to be compensated, then simple negligence should be the rule, leaving, of course, to the actors their defenses as they would have them at common law. *Pierson v. Ray*, 386 U.S. 547 (1967).

This Court need not decide the question whether simple negligence suffices under § 1983 since the complaint in this action alleges circumstances bringing the case within the gross negligence rule of *Jenkins*. Hence, count 5 of the amended complaint should not be dismissed for failure to state a claim. Nor should either side's motions for summary judgment be granted—the facts need developing. Motions to dismiss and for summary judgment denied.

Dated: Nov. 17, 1972.

/s/ Robert F. Peckham
United States District Judge